79-1559

Supreme Court, U. S.
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In The
Supreme Court Of The United States

_____ TERM, 1980

NO. A-618

RONALD HOWARD BRAMBLETT
Petitioner

V.

STATE OF TENNESSEE
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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OPINION BELOW

The Opinion of the Court of Criminal Appeals, Eastern Division, Knoxville, Tennessee, filed September 4, 1979, is appended hereto and is unreported otherwise at this time. Trial Court judgment affirmed.

JURISDICTION

The judgment of the Supreme Court of the State of Tennessee was entered October 29, 1979, in which certiorari was denied. Petition to Rehear was not filed by original counsel of record, William H. Ortwein, who represented petitioner from the original trial through appellate procedure in the Courts of Tennessee. The jurisdiction of this Court is invoked under Title 28, 1257 (3). Notice of Petition for Writ of Certiorari to this Honorable Court was filed January 17, 1980. Extension of time was granted January 16, 1980.

QUESTIONS PRESENTED FOR REVIEW

I. Has the petitioner's right to equal protection and due process been denied under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, when

   A. Highly inflammatory and prejudicial remarks have been made by the prosecutor in his opening and closing jury arguments, outside the scope of the trial evidence with no curative instructions given to the jury by the trial court, when the jury finds and assesses an enhancement penalty?

   B. Defense counsel objects to such inflammatory and prejudicial remarks and the trial court overrules the objections, which

seems to favor the state and yet instructs the jury to disregard such statements, which seems to favor the defendant, with no curative instructions being given by the trial court?

C. The prosecutor repeatedly makes such inflammatory and prejudicial remarks, and the trial court fails to admonish him?

D. Does the federal question of fundamental fairness require that, in addition to curative instruction by the trial court, that counsel for the petitioner should be given the right to explanatory rebuttal argument in order to attempt to undo the impossible task of extracting from the mental processes of the trial jury all such inflammatory and prejudicial remarks, and thereby give petitioner his best opportunity to a fair trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment, United States Constitution.
2. The Sixth Amendment, United States Contitution.
3. The Fourteenth Amendment, United States Constitution.

Amendment 5:

Criminal actions--Provisions concerning--Due process of law and just compensation clauses-- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6:

Rights of the accused. -- In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment 14:

Citizenship--Due process of law--Equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE FACTS

The petitioner was first tried March 10, 1978, but since the jury was unable to reach a verdict, a mistrial was granted. His second trial was held on July 31, 1978, with a jury finding of guilt and punishment set at ten to fifteen years in the penitentiary. Tennessee statutes provide for a penitentiary term of five to fifteen years for first degree burglary and an enhancement penalty of an additional five years to the minimum term if a firearm is possessed at the time of the breaking and entering as the trial jury found herein.

THE EVIDENCE

The evidence against the petitioner is essentially as follows:

James Stewart testified for the state (R. 2-19) that he returned home on the night of October 13, 1977, that he observed a man crawling out of a window of his duplex with his back to him and that he yelled and grabbed the man. He testified that he got this real good look at the man by light from a street light, even though the man's back was toward him. A scuffle followed, Stewart fell to the ground, dropping his armload of papers, arose, gave chase as the man fled from him, was reaching to grab him again, and at this point, the man pulled a pistol and threatened to shoot him. (R.5). All other identification of the petitioner is circumstantial. Mr. Stewart further testified that he called the police and gave them a general description of the man; that on the next day he viewed a photographic lineup, which contained several black and white photographs and one color photograph, and that he identified the color photograph as the man with whom he scuffled, and that the color photograph was one of the defendant.

On cross-examination, Mr. Stewart testified that he was startled and confused when he discovered a man climbing from the window; that he was scared during the scuffle and believed that the other man was also scared. Mr. Stewart further testified on cross-examination that in his initial description, he had said that the man had blondish

hair; (R. 14) and he then testified that the defendant's hair was not blonde but very dark. (R. 16).

Mr. John Welch, testifying for the State stated that he lived about one and one-half blocks from Mr. James Stewart, that he knew the defendant when he worked for the Bradley County Ambulance Service; that on October 13, 1977, he observed the defendant driving by his house in a red car.

Miss Sherry Phillips testified for the State that she dated Mr. Stewart's roommate and that she was at their residence on October 13, 1977, from 4:00 p.m. until 10:00 or 11:00 p.m. She further stated that when she started to leave, she discovered that she had locked her keys in her car and that as she was trying to get inside her car, a man stopped and offered to help her. She testified that she had a conversation with the man who said that he was Mike Pierce's brother-in-law and that he was driving a red or maroon car. She then stated that the man told her his name was Ronnie Bramlett.

On cross-examination, Miss Phillips stated that she remembered testifying in the previous trial; but when asked why in any of her previous testimony she had never testified that the man told her his name was Ronnie Bramlett, she replied "I don't know". (R. 31).

David Tinsley was called as a witness for the State and testified as follows:

That in October, 1977, he was an officer with the City of Cleveland Police Department and that he took the call reporting a burglary at the Stewart residence. He went to the residence, took a statement from Mr. Stewart, searched the neighborhood, and examined the duplex where he found the bedroom messed up.

The next day (Friday), Mr. Tinsley interviewed the other occupant of the duplex and Miss Sherry Phillips, from whom he took a statement. He later conducted a photographic lineup which he presented to Miss Phillips on Saturday afternoon and to Mr. Stewart on Saturday night. Miss Phillips and Mr. Stewart identified the picture of the defendant.

On cross-examination, Mr. Tinsley stated that he found no fingerprints, that nothing was missing from the apartment and that no gun was ever recovered. He further stated that Miss Phillips in her statement never said that the man told her his name was Ronnie Bramlett (R. 42). Mr. Tinsley further stated that he prepared a photographic lineup of ten pictures, only one of which, the defendant's, was in color (R.43). He further testified that five of the pictures had a height chart and that in three others the subjects were wearing striped clothing similar to prison garb. (R. 44).

On redirect, Mr. Tinsley testified that Mr. Stewart had stated that the gun carried by the burglar was of blue steel with white handles.

Mr. Tinsley also stated that at one time he and the victim, James Stewart, had been roommates. (R. 47).

The State rested and the defendant then presented an alibi defense

as follows:

Mrs. Teresa Bramlett testified that she was the wife of the defendant; that they owned two vehicles, a red Buick and a blue van; that her husband owned a black gun which stayed in the nightstand in their bedroom.

She further testified that on October 13, 1977, she saw her husband in the morning before she left for work, and that she drove the red Buick to work that day. Mrs. Bramlett stated that she remembered the day because her birthday was October 15.

She further testified that she next saw her husband at about 7:00 p.m. that night, that they went to the house of some friends in Chattanooga where they remained until about 1:00 a.m. on the morning of October 14, 1977. She stated that she and her husband returned home and he remained there all night.

Mr. Jim Shadden, a witness for the defense, testified that he was a maintenance foreman for Combustion Engineering, that he had been employed there for twenty-six years, and that he resided in Chattanooga, Tennessee.

He stated that he knew the defendant Ronnie Bramlett and that on Friday night, October 14, 1977, the defendant and Mrs. Bramlett were present at his home. He remembered this night because Mrs. Bramlett had a cake which they shared in celebration of her birthday. He further testified that the Bramletts had been at his home on at least three occasions during that week and that they stayed from 7:00 or 8:00 p.m. until 1:00 or 2:00 a.m. (R. 59-62).

Mrs. Charlene Shadden, testifying for the defense, stated that she was the wife of Jim Shadden, that she and her husband had met the Bramletts in September, 1977, and that in the week preceding October 14, the Bramletts had been present in her home some three or four nights until after 1:00 a.m.

Mr. Ronald Howard Bramlett, testifying in his own behalf, stated that on October 13, 1977, he owned a Dodge van, a Buick Century and a Ford Torino. That on that day he started to leave home in his blue van but discovered that it would not start. He called the Chevron station in Ooltewah and had his van repaired. He paid for the service and introduced into evidence a receipt from the station dated October 13, 1977.

Mr. Bramlett stated that he then drove in his blue van to Parker Brothers Carpet Company in Dalton, Georgia, arriving there about 11:30 a.m. He then went to his parents' home for lunch and bought some gasoline at a service station in Dalton, introducing a receipt for it as an Exhibit to his testimony, before returning to Parker Brothers.

Mr. Bramlett testified that he spent the afternoon of October 13, 1977, at Parker Brothers Carpet Company, then returned home to Ooltewah.

Mr. Bramlett further stated that he and his wife then went to the home of Jim and Charlene Shadden, arriving there at about 8:00 p.m. and staying until after the television went off. (R. 67-74).

Mr. John Bramlett, testifying for the defense, said as follows:

That he is the father of the defendant, that he resided in Dalton, Georgia, and that his daughter-in-law, Teresa Bramlett's birthday was Saturday, October 15, 1977. Mr. Bramlett stated that he had lunch with his son on Thursday, October 13, and Friday, October 14, 1977, at his home in Dalton, and that on those days, his son was driving his blue van.

Mr. Sammy Sadler testified for the defense as follows:

That in October, 1977, he was employed by the Chevron Service Station in Ooltewah and he was called by the defendant to start his van. Mr. Sadler stated that he went to the defendant's home, started his van, brought it back to the station and repaired it. Mr. Sadler identified the date as October 13, 1977, from a work order which he had given the defendant. Mr. Sadler stated that Mr. Bramlett first called him at about 9:30 a.m. and that the defendant was at the Chevron station for about one to one and a half hours. (R. 84-85).

Mr. Kenneth Bailey, a witness for the defense, testified as follows:

That in October, 1977, he was employed by Parker Brothers Carpet Company in Dalton, Georgia, and that he had met the defendant when he came to Parker Brothers to pick up some carpet he had ordered. Mr. Bailey stated that Mr. Bramlett was at Parker Brothers on a Thursday and Friday during October, and that he did not know the exact dates, but

"I saw him on Thursday of that week if his wife's birthday was the following Saturday." (R.89, 11. 17-18).

Mr. Bailey further testified that he remembered Mr. Bramlett because he "aggravated" (R. 89, 1.23) Mr. Bailey most of the day about the carpet he ordered. Mr. Bailey stated that Mr. Bramlett arrived before noon and was there until the early evening. Mr. Bailey also testified that he had borrowed Mr. Bramlett's blue van that afternoon so his deliverymen could deliver a small order to a nearby customer in Dalton.

The defense then rested.

In his closing argument, Attorney General Fisher made the following statements:

> Ronald Bramlett, you see wasn't sure, wasn't absolutely sure when he decided to commit this burglary whether he would catch Mr. Stewart, the man who was working on the railroad, his wife, his girlfriend, his children, or some other person in that house or get caught that night, and that gun he had was for one purpose, to make certain he didn't get caught. And don't you believe, don't you believe that he would have shot and killed had it got down to it. (R.

p. 101, 1. 24, p. 102 1.6).

> Now let's look at his defense very briefly. A lot of witnesses through (sic) where he was on Friday night, and some of them Saturday, and some of them Sunday. Witnesses proved where he was some times Thursday. You know, not every criminal looks like a criminal. As a matter of fact, there's not any one picture of a criminal person who involves in burglarious activity especially. Now, he has got some kind of calling. He is some sort of independent salesman. He owns a new car and a relatively new van. I submit to you, ladies and gentelmen, that he is a burglar, that in addition to his main cause he steals for a living and he has used the proceeds of his good to go on through life, the hard earned income of others. (R. p. 103, 1. 23 to R. p. 104, 1.10).

At this point, the defense objected and moved for a mistrial. The Court overruled the motion and instructed the jury to disregard the statements. (R. p. 104, 1. 11-14).

General Fisher later in his argument made the following statements:

> Let's assume that all of this is true, and I submit to you, ladies and gentlemen, he is a burglar, he is guilty of burglary. you know, burglars have normal lives in addition to their unlawful activity. You can assume that. His wife did have a birthday. He did go to lunch with a parent. He certainly did not have the van both days if you believe his wife. You remember she said she had the van Friday. Aren't they scrambling right, left, and sideways to create enough confusion, enough confusion to confuse one of you? Does that look like what they are doing in this defense that they have concocted? (R. p. 106, 11. 9-19).

General Fisher at R. p. 108, 11. 5-12 makes these statements:

> It could have been anybody's residence. On this occasion we have James Stewart being burglarized by this man, armed and dangerous. Think when you retire to the jury room, and prior to your discussions or as you are listening to me now, what you are going to do the night you come home, or one of your friends or family members comes home, and there's an armed man in there burglarizing your house. Now, if that doesn't justify a verdict of ten to fifteen years. . . . .

The defense objected and moved for a mistrial. The Court replied as follows:

> The jury will disregard these statements made by the Attorney General and I'm going to overrule the motion. (R. p. 108, 11. 18-20.)

Petitioner's Assignment of Errors in the State Courts below have been:

THE COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTIONS TO THE STATE'S CLOSING ARGUMENT.

THE COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A MISTRIAL BASED ON THE STATE'S CLOSING ARGUMENT.

THE COURT ERRED BY NOT GIVING A CURATIVE INSTRUCTION TO THE JURY AFTER INSTRUCTING THEM TO DISREGARD STATEMENTS MADE BY THE DISTRICT ATTORNEY GENERAL IN HIS CLOSING ARGUMENT.

ARGUMENT AND AUTHORITIES

Closing argument must be temperate, must be predicated on evidence introduced during the trial of the case and must be pertinent to the issues being tried. Russell v. State, 532 S.W. 2d 268 (1976).

Public interest requires that the trial court as its power and duty protect a defendant in his right to a verdict which is uninfluenced by appeals of prosecutor to passion or prejudice. Sparks v. State, 563 S.W. 2d 564 (1978).

> . . . . he is a burglar. . . .he steals for a living and he has used the proceeds of his good to go on through life, the hard earned income of others. (R. p. 104, 1. 7-10).
>
> Think . . . .what you are going to do the night you come home. . . . and there's an armed man burlgarizing your house. Now if that doesn't justify a verdict of ten to fifteen years. . . (R. p. 108, 11. 6-12). (Emphasis added.)

These statements by General Fisher are not temperate, nor are they predicated on the evidence. They are outrageous appeals to passion and prejudice.

Russell v. State, 532 S.W. 2d 268, involved a case in which the prosecutor's closing argument attacked the testimony of the psychiatrist called by the defendant and insinuated that a conspiracy among psychiatrists and attorneys could in some cases lead to inappropriate or fraudulent insanity pleas. The Supreme Court reversed the conviction because of this argument, noting that:

> In attacking the core of the defense, his statements raised the spectre of conspiracy, deceit and worse on the part of psychiatrists, psychologists, and attorneys and were not warranted by any evidence in the record. The argument is not only improper, but being on a material issue undoubtedly had a prejudicial effect on the jury. 532 S.W. 2d at p. 271.

General Fisher argued to the jury:

> Aren't they scrambling right, left and sideways to create enough confusion to confuse one of you? Does that look like what they are doing in this defense they have concoted? (R. p. 106, 11. 16-19, emphasis added).

Harrington vs. State, 385 S. W. 2d 758 (1965) sets out the following criteria to determine if the improper conduct by the prosecutor could have had prejudicial effect upon the verdict:

1. The conduct complained of in view of the light of the facts and circumstances of the case.
2. The curative measures undertaken by the Court and the prosecutor.
3. The intent of the prosecutor in making the improper statement.
4. The cumulative effect of the improper conduct.
5. The relative strength or weakness of the case.

An analysis of the conduct of General Fisher in the Bramlett trial using these criteria shows that his statements were improper and prejudicial to the verdict.

The defense in this case was an alibi. The State presented three witnesses who placed Mr. Bramlett in Bradley County at different times on October 13, 1977. The defense presented six witnesses who placed Mr. Bramlett elsewhere on that date.

The case of the State was not any stronger than that of the defense. The State's evidence did not over-whelm that of the defense. As in all alibi defenses, it was a question for the jury.

The first jury in this case, presented with the conflicting theories of the State and the defense, was unable to reach a verdict, resulting in the mistrial declared on March 10, 1978.

The improper statements of the Attorney General were calculated appeals to bias, passion, and prejudice:

"And don't you believe, don't you believe that he would have shot and killed had it got down to it. (R. p. 102, 1. 4-6).

"Think when you retire to the jury room, and prior to your discusssion or as you are listening to me now, what you are going to do the night you come home or one of your friends or family members comes home, and there's an armed man in there burglarizing your house. Now, if that doesn't justify a verdict of ten to fifteen years. (R. p. 108, 11. 5-12).

"He is a burglar, that in addition to his main cause he steals for a living and he has used the proceeds of his good to go on through life, the hard earned income and assets of others. (R. p. 104, 11. 7-11).

This defense that they have concoted. (R. p. 106, 11. 18-19).

"This defense that they concoted. (R. p. 106, 11. 18-19)." any one statement. After objections by the defense and statements by the Court that the jury should disregard the Attorney General's

remarks, General Fisher continued throughout the course of his argument to make statements outside the evidence presented. It was continuing and calculated behavior on the part of the Attorney General.

There were no curative measures undertaken by the Attorney General; he merely continued his improper conduct; he made no retractions. The Court gave no curative instruction, but merely told the jury to "disregard these statements made by the Attorney General."

Judge v. State, 539 S.W. 2d 340 (1976), involved a similar situation, where the trial court simply instructed the jury to disregard the statement. This Court held that "in view of the highly prejudicial nature of the statement, that further action was called for, e.g., an admonition to the prosecutor." 539 S.W. 2d 346, and that an improper statement by the prosecutor made during argument may constitute reversible error despite a curative instruction.

The intent of the Attorney General in making these statements was to insure a conviction. This was the second time he had tried this case; there had already been one jury unable to reach a verdict. The Code of Professional Responsibility, Canon 7, Ethical Consideration 7-13 provides:

The responsibility of a public prosecutor differs from that of the ususal advocate; his duty is to seek justice, not merely to convict.

In violation of this, the intent of General Fisher in his continued improper conduct was to insure that he got a conviction.

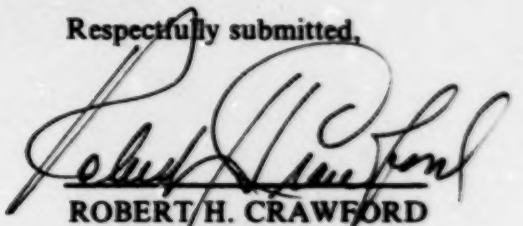
THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Petitioner submits that the actions, opinion and judgment below presents substantial questions warranting the acceptance of jurisdiction by this Honorable Court.

CONCLUSION

From time immemorial, the trial lawyer has used the trial tactic "get the evidence before the jury" and then it is impossible to get it out of their minds by curative instructions by the Court. It has been said that a Court's curative instructions to a jury are much like trying to extract a drop of ink dropped into a pail of water with the use of an absorbent paper towel; you may get some of it back, but it is impossible to extract it all. The statements of the prosecutor went greatly beyond the bounds of proper argument and prejudiced the rights of petitioner beyond correction even if attempts had been made. The conviction should be reversed and the cause remanded for new trial.

Respectfully submitted,



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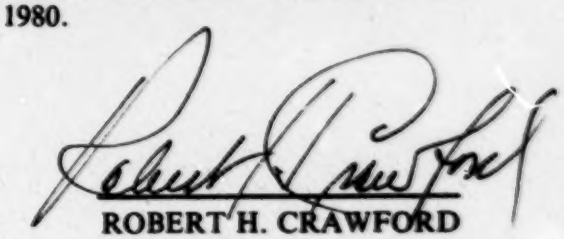
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed to the Honorable William Leech, Attorney General of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219, and to the Honorable Richard A. Fisher, District Attorney General, P.O. Box 1351, Cleveland, Tennessee, this 20th day of March, 1980.



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